EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2017/2 Length of service is not a protected characteristic for discrimination and roles with different educational requirements are not comparable (HU)

<p>The <italic>Curia</italic> (Hungarian Supreme Court) stated in its ruling that length of service is not a protected characteristic under discrimination law. Length of employment cannot be considered as a core feature of the individual based on which he or she would belong to a specific group, as it is a result of his or her own actions. It therefore cannot be treated as a 'miscellaneous' ground for the purposes of the Hungarian Equal Treatment Act. Further, length of service cannot be linked to age discrimination. The length of service of an employee is not directly connected to age, therefore treatment of an employee based on length of service with a specific organisation cannot be considered age discriminatory.<lb/>A claim based on discrimination must be supported by a comparator. Employees with different educational backgrounds and jobs with different the educational requirements, are not comparable for the purposes of equal treatment law.</p>

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Facts

The claimant had worked at the defendant since 15 July 1994 and had been promoted to work as Head of the Security Department on 14 December 2009. After a series of organisational changes, the Security Department was merged into the Procurement and Logistics Division in May 2011 but disbanded almost immediately, on 24 June 2011. The tasks of the Security Department were shared out between three different departments (Property Management, Information Management and Enforcement). Because of these changes, on 24 June 2011, the employer served notice of termination for redundancy to the claimant. The notice letter provided that the Head of Security position was abolished and its tasks redistributed within the organisation. Shortly after the restructuring, two new employees were hired in the Information Management Department and tasked with internal audit and data privacy responsibilities.

The claimant filed a claim for unfair dismissal arguing that his role had not been abolished in reality. While the employer maintained that the Security Department's functions had been abolished, a new department (Information Management) had been created whose responsibilities were identical to the Security Department and the employer had hired new staff to work in that department. The claimant also noted that the CEO of the employer had made statements prior to the restructuring to the effect that it was necessary to make older, more senior staff redundant – and that this amounted to age discrimination.

Judgment

The first instance court did not accept the claim and held that the termination of employment was fair. The court held that the restructuring was genuine and the position of the claimant had been abolished. As far as discrimination was concerned, the court found no evidence of it, arguing that the claimant had the burden of proof to make a prima facie case and the fact that a number of employees with long service had been made redundant did not, in itself, amount

to age discrimination. There was no causal link between the statement of the former CEO and the redundancies, as the statements were made in 2009, not 2011, when the restructuring took place. When the redundancies were implemented, the CEO was no longer an employee of the defendant and was therefore not in a position to make decisions about the employees.

The claimant lodged an appeal, arguing that the decision was incorrect – and this was ultimately successful. The Court of Appeal held that the termination of employment was unfair. Although it found the restructuring itself was genuine, it held that it was discriminatory and breached equal treatment law. The claimant had a prima facie case of age discrimination since the newly hired employees were more than ten years younger than him and the defendant could not prove that its actions were in line with the principle of equal treatment. Therefore, the Court of Appeal held that the termination of employment was unfair.

During the proceedings before the Court of Appeal, the defendant maintained that while age is a protected characteristic and age discrimination is prohibited under Section 8 of Act CXXV of 2003 on Equal Treatment, which is the Hungarian statue implementing the EU equal treatment directives, (the 'Equal Treatment Act'), only certain age groups are in fact protected – namely, younger employees and those over 50. Since the claimant was in his forties he was not in a protected age group. The claimant also argued that he was discriminated against because of his length of service. He argued that the fact that he had been at the employer for 17 years was used as part of the selection criteria and that this was linked to age under the Equal Treatment Act. The Court of Appeal accepted this view. During the hearing, one of the witnesses admitted that one of the selection criteria was in fact length of service, and this shifted the burden of proof to the employer to prove that it had not engaged in discrimination.

The defendant filed an extraordinary appeal before the Curia arguing that length of service in itself is not protected and that it therefore could not be required by the court to prove that the termination was not discriminatory on grounds of age.

The Curia has now reversed the decision of the Court of Appeal and held that the termination of employment was fair and not discriminatory. The Curia noted that the restructuring was genuine and the position held by the claimant had been abolished. This is a valid ground for redundancy. The Curia found that the new employee hired as the 'Head of the Information Management Department' was required to perform tasks outside the scope of the claimant's work, as he was also responsible for compliance and data privacy.

The Curia disagreed with the Court of Appeal that the termination of employment was discriminatory. The Court of Appeal had held that there was age discrimination because of a witness statement which provided that one of the selection criteria was age and length of

service, and the defendant could not prove the redundancy was not discriminatory.

In its analysis, the Curia disagreed with the reasoning of the defendant that only young employees and employees above 50 are protected by age discrimination legislation. There is no such exclusion by law and this interpretation could lead to the exclusion of cases where there is discrimination between different age groups.

The Curia relied on the decision in C-132/11 (Tyrolean Airways Tiroler Luftfahrt GmbH – v – The Board of Tyrolean Airways Tiroler Luftfahrt GmbH) where the ECJ ruled that a difference in treatment based on the date of recruitment by the employer is not directly or indirectly based on age or on an event linked to age.

In the case at hand, this means that the Court of Appeal erred in holding that selection criteria based on length of service amounted to age discrimination. Employment can start at any age and therefore there is no direct and immediate link between age and length of service. It is therefore not possible to treat length of service as a ground within the category of 'miscellaneous' – which exists in the list of protected characteristics in the Equal Treatment Act – since only grounds that are linked to human dignity and are suitable for differentiating a group can be used as protected grounds. No one had tried to argue that length of service fell outside age, but within 'miscellaneous', as length of service is not something that characterises the daily existence of a person.

As length of service is not a protected ground, the court only needed to assess the claim of age discrimination. In relation to this, the defendant had to prove that there was no causal link between the age of the claimant and the fact that his employment has been terminated. The defendant managed to do this because during the redundancy process it had shown that the claimant and the new Head of the Information Management Department were not in comparable positions. The reason for this was that the new Head of the Information Management Department needed a law degree because of the new tasks concerning compliance and data privacy. The defendant had no such degree. Therefore, the selection criteria were not age, but rather educational background. There was therefore no discrimination.

Commentary

This is an interesting case because discrimination decisions are quite unusual in Hungary, especially in relation to age. Since discrimination law relies heavily on EU law, it is helpful that the Curia relied on ECJ case law to make its decision. The decision itself clarifies the issue of length of service and age in a way that should be a useful precedent, particularly as Hungarian law does not specify any particular rules about the selection criteria for cases of redundancy.

The judgment is also in line with the decision of the ECJ in Tyrolean Airways.

What the Curia said about comparability is also interesting. The Curia seems to follow a narrow line of reasoning that reflects ECJ case law, for example Barbel Kachelmann – v – Bankhaus Hermann Lampe KG (C-322/98) and Angestelltenbetriebsrat der Wiener Gebietskrankenkasse – v – Wiener Gebietskrankenkasse (C-309/97) and it accepted that different training and qualifications preclude comparability. The Curia accepted the principle that just because there is no direct comparator does not imply any direct disadvantage per se.

Comments from other jurisdictions

United Kingdom (Bethan Carney, Lewis Silkin): If this case was being heard in the UK, it is likely that a different decision would have been reached. A redundancy selection criterion based upon length of service would almost certainly be found by the UK courts to be indirectly discriminatory on grounds of age because, although ostensibly neutral, it would tend to disadvantage older employees. Of course, it might be possible for the employer to justify the use of that selection criterion if it was a proportionate means of achieving a legitimate aim. It is not clear from this case report, however, that any such justification would have been available to this employer.

The decision by the ECJ in the Tyrolean Airways case mentioned above is very specific to its facts and can potentially be distinguished from this situation. In that case, Tyrolean Airways and Lauda Air were two wholly owned subsidiaries of Austrian Airlines. There was a Tyrolean Airways collective agreement which stated that its flight and cabin crew were to be graded 'A' or 'B' and that staff would progress to category 'B' status three years after recruitment (which re-grading would increase their pay). The collective agreement did not state whether it referred to recruitment by Tyrolean Airways only or by any of the three associated companies but the agreement stated on the face of it, that it was applicable to the flight and cabin crews of Tyrolean Airways. The dispute in the case was about whether the collective agreement should be interpreted to mean that employees could count service with one of the other two group companies in order to be graded as category 'B'. The question referred to the ECJ was whether it was age discriminatory not to count service with either of the other two companies when considering if an employee of Tyrolean Airways should be categorized as category 'B'. The ECJ held that it was not discriminatory on the grounds of age. It is hard to disagree with the ECJ's conclusion – as all the employees in question would have three years' service with someone. The employees who had three years' service with Tyrolean Airways were not more or less likely to be older than employees who had the same amount of service with Lauda Air and Tyrolean Airways combined. That is different from the facts of the case discussed above, where selecting employees for redundancy because they had longer service is very likely to

mean selecting employees who were on average older than those with shorter service.

On another issue, from a UK perspective it is hard to understand why the defendant could not claim that he was being discriminated against because the new Head of the Information department was not in a comparable position. For an indirect discrimination claim such as this one, he would not have needed a comparator to prove less favourable treatment, he would merely have had to show that his employer applied a provision, criterion or practice (PCP) to him that it also applied to other people not of the same age as him and that the PCP puts (or would put) people of his age at a particular disadvantage when compared to other persons. Finally, that the PCP puts (or would put) him at that disadvantage and that it cannot be justified as a proportionate means of achieving a legitimate aim. This test does not require a comparator in exactly the same position.

As a final point, it is also possible that selecting because of educational background would be found to be indirectly discriminatory in the UK, as a greater proportion of people get university degrees now than was the case in the past. A recent tribunal case relied upon statistics showing that those aged 45 to 54 were less likely to be graduates, in order to find that it was age discriminatory for an offer of alternative employment in a redundancy situation to be dependent upon degree level qualifications. Of course, in the case above it might be the type of degree rather than merely possessing one which was relevant and it may well be possible to justify any requirement for a degree as a proportionate means of achieving a legitimate aim, if the qualification is necessary for the job.

Germany (Paul Schreiner and Jana Voigt, Luther Rechtsanwaltsgesellschaft mbH): The German courts would presumably have ruled the same way. Redundancies are justified if the employer can prove that a management decision was taken which resulted in the loss of specific workplaces; or that there is no other employee in a comparable position to the one dismissed (including as regards educational achievement), who is less worthy of protection under the Unfair Dismissal Act (taking into account age, length of service, dependants and any significant disabilities); and that there are no other jobs that could be offered to the dismissed employee.

According to German law, length of service is regarded as a reason to protect employees. Therefore, having a length of service criterion is not considered, in itself, as discrimination on grounds of age. For example, by section 622(2) of the German Civil Code (Bürgerliches Gesetzbuch. the 'BGB'), the length of the notice period should depend on length of service: the longer the employment, the longer the notice period.

However, according to the ECJ (and subsequently the German courts), section 622(2)(2) is

discriminatory to the extent that it does not protect periods of employment when an employee is under 25. The ECJ ruled the provision invalid in case C-555/07, Seda Kücükdeveci – v – Swedex GmbH & Co KG, 19 January 2010. The court regarded it as unjust unequal treatment, as it stipulated different treatment on grounds of age. Even though the ECJ acknowledged that the provision was intended to support older employees, who often have more difficulty finding a new job, it decided that it was not reasonable, as it distinguished between employees who started their employment before 25 and those whose employment began when they were over 25, irrespective of their current age. This could result in a situation in which there was unequal treatment of employees of the same age. Hence, the protection of older employees could not be used as a justification of the measure and the provision could not be applied.

Subject: Discrimination; age

Parties: Unknown

Court: Curia (Hungarian Supreme Court)

Date: 2016

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